Supreme Court, U.S.
FILED
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(2)

No. 90-1503

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN G. ORDWAY, JR. and MARGARET M. ORDWAY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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72p

QUESTION PRESENTED

Whether petitioner's partial disclaimer in 1979 of a vested remainder interest in an inter vivos trust created by his grandfather in 1917 was a transfer subject to the federal gift tax.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 908 F.2d 890. Rehearing was denied without opinion (Pet. App. 27a-28a). The memorandum opinion of the district court (Pet. App. 15a-24a) is unofficially reported at 89-1 U.S.T.C. (CCH) ¶ 13,802.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. The order denying a petition for rehearing was entered on November 1, 1990 (Pet. App. 27a-28a). An extension of time to and including March 27, 1991, for filing a petition for a writ of certiorari was granted by Justice

Kennedy on January 9, 1991. The petition was filed on March 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at the Appendix, *infra*, 1a. The relevant portions of Section 25.2511-1(c) of the Treasury Regulations on Gift Tax (26 C.F.R.) are set forth at the Appendix, *infra*, 1a-3a.

STATEMENT

1. Lucius P. Ordway, the grandfather of petitioner John G. Ordway, Jr.,[1] established an irrevocable inter vivos trust on January 16, 1917. The term of the trust was for the lives of Lucius Ordway's wife and five children, and the income generated by the trust was paid to them. The trust provided that, upon the death of the last surviving life beneficiary, the corpus of the trust was to be distributed to Lucius Ordway's grandchildren, per capita. The trust further provided that, if any of Lucius Ordway's grandchildren died leaving issue prior to the termination of the trust, that grandchild's share of the corpus was to be distributed to his or her issue, per stirpes (Pet. App. 2a).

At his birth on November 29, 1922, petitioner thus acquired a contingent remainder interest in the trust. Petitioner became aware of his interest in the trust in 1941, when he was nineteen years old. Petitioner's interest vested on June 27, 1979, upon the death of Lucius Ordway's last surviving

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[1] Margaret Ordway is a party hereto by virtue of having consented, pursuant to Section 2513 of the Code, to have her husband's gifts considered as made one-half by each of them. In the interest of clarity, however, we will refer to John G. Ordway, Jr., as petitioner, inasmuch as it is his trust interest and his disclaimer that underlie this litigation.

child. On August 23, 1979, petitioner filed a valid, partial disclaimer of his interest in the trust corpus under Minnesota law. By virtue of the disclaimer, petitioner's three children received the disclaimed portion of his interest in the trust (Pet. App. 2a).

Petitioner filed a gift tax return with the Internal Revenue Service disclosing the 1979 disclaimer, but taking the position that the disclaimer was not a transfer subject to the gift tax. During an audit of that return, petitioner filed an amended return which treated the disclaimer as a taxable transfer under the gift tax provisions. Petitioner paid the tax shown to be due on his amended return. The Internal Revenue Service later assessed deficiencies and interest, which petitioner paid (Pet. App. 3a).

On March 10, 1980, petitioner made a gift of stock that was unrelated to the 1979 disclaimer. Petitioner filed gift tax returns for 1980, but the Commissioner determined that, because of the recharacterization of the 1979 disclaimer as a gift, there was a deficiency for 1980. Petitioner paid the gift tax due, and also paid the deficiencies determined by the Commissioner. Petitioner filed timely claims for refund of the taxes and interest paid for 1979 and 1980, which the Commissioner disallowed.

2. On March 16, 1987, petitioners filed suit in district court seeking a refund of the taxes and interest paid (Pet. App. 3a-4a). Both parties filed motions for summary judgment. The government contended that this Court's decision in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), controls the outcome of this case. *Jewett* established that a disclaimer is subject to the gift tax unless it falls within the narrow exception in Section 25.2511-1(c) of the Treasury Regulations on Gift Tax (26 C.F.R. 25.2511-1(c)), which provides that a disclaimer is not subject to tax if it is effective under local law and is made "within a reasonable time after knowledge of the existence of the transfer." *Ibid*. This Court

held in *Jewett* that the term "transfer" as used in the regulations for measuring the timeliness of the disclaimer refers to the original creation of the interest, rather than the subsequent vesting of that interest. 455 U.S. at 310. In *Jewett*, the trust was established by the taxpayer's grandmother in 1939, but the taxpayer did not disclaim his contingent remainder interest until 1972. The Court held that the disclaimer, filed 33 years after the interest was created, was untimely. Relying on *Jewett* in this case, the government thus contended that petitioner's disclaimer was not timely because it was made 38 years after he learned of his interest in the trust (Pet. App. 19a-20a).

Petitioner argued that this case is distinguishable from *Jewett* because the trust established by petitioner's grandfather had been created in 1917, prior to the enactment of the gift tax in 1932. Petitioner also argued that applying the gift tax to the partial disclaimer would constitute an improper retroactive application of the gift tax to the original 1917 transfer in trust (Pet. App. 19a-22a).

The district court granted petitioner's motion for summary judgment, holding that the disclaimer in 1979 did not constitute a transfer subject to the gift tax. The court found this case to be distinguishable from *Jewett* because the trust was created in 1917, prior to the enactment of the gift tax (Pet. App. 25a-26a).

3. The court of appeals reversed, with one judge dissenting. The court concluded that petitioner's disclaimer of his trust interest was not made within a "reasonable time" under this Court's opinion in *Jewett*, and that the disclaimer was therefore a taxable gift (Pet. App. 11a-12a).

ARGUMENT

The court of appeals correctly held that the partial disclaimer in 1979 of an interest in a trust created in 1917

is properly subject to the federal gift tax. The result in this case is a direct application of this Court's decision in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982). The decision of the court of appeals is not in conflict with the decision of any other circuit. Further review by this Court is therefore not warranted.

1. Sections 2501(a) and 2511(a) of the Internal Revenue Code impose a tax "on the transfer of property by gift," whether the transfer is in trust or otherwise, and whether the gift is "direct or indirect." 26 U.S.C. 2501(a), 2511(a). When a person disclaims an interest in property, that person reduces the size of his taxable estate, directs the passing of the property to others, controls its enjoyment, and confers a gratuitous benefit upon "the natural objects of his bounty." *Jewett* v. *Commissioner*, 455 U.S. at 319 (quoting *Jewett* v. *Commissioner*, 70 T.C. 430, 438 (1978)). This Court held that indirect transfers of property by means of a disclaimer are therefore properly treated as taxable gifts subject to the federal gift tax. 455 U.S. at 318.

In 1958, 21 years before the disclaimer at issue in this case, the Internal Revenue Service issued Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, which provides a narrow exception to the gift tax for a limited category of disclaimers.[2] The regulation establishes two separate requirements for a disclaimer to qualify as a nontaxable transfer. First, the disclaimer must be unqualified, unequivocal, and effective under local law. Second, the disclaimer must be made "within a reasonable time" after a person learns of his rights in the property. Treas. Reg. § 25.2511-1(c)(2). In *Jewett*, this Court held that the "reasonable time" requirement is measured from the date of knowledge of the transfer which created the disclaimed

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[2] This regulation applies to all disclaimers made after December 31, 1954. See 23 Fed. Reg. 8904-8905 (1958).

interest, as opposed to the date on which that interest either vested or became possessory. 455 U.S. at 318.

The court of appeals was therefore unquestionably correct in holding (Pet. App. 10a) that the disclaimer that occurred in this case—38 years after petitioner learned of his rights in the property—was not made within a "reasonable time" under this Court's holding in *Jewett*. As the court observed, the 38-year delay in this case "is some twelve to fourteen years over the twenty-four year period which the Supreme Court found unacceptable in *Jewett*." *Ibid*. The disclaimer therefore did not qualify as a non-taxable transfer under the regulation. *Ibid*.

2. Petitioner contends (Pet. 9-15), however, that a gift tax cannot be imposed on a disclaimer of a property interest that was created prior to the enactment of the federal gift tax in 1932. Petitioner argues that the "transfer" at issue in this case was made by Lucius Ordway in 1917, well before the passage in 1932 of the gift tax, and therefore cannot constitutionally be subject to that tax.

Petitioner's argument misperceives the transaction to which the gift tax is being applied. It is the 1979 disclaimer, not the 1917 transfer in trust, that constitutes the taxable event. The Internal Revenue Service has not attempted to impose a gift tax on the original transfer in trust made by petitioner's grandfather in 1917. That transfer was clearly not subject to the gift tax. The 1917 transfer is relevant *only* insofar as it establishes the date from which the petitioner has a "reasonable time" to disclaim an interest in property under the regulation. When petitioner obtained a contingent remainder interest in the trust upon his birth in 1922, that remainder was unquestionably free of any gift tax consequences insofar as his grandfather was concerned.

Petitioner's partial disclaimer, however, which was executed in 1979, is a wholly separate matter. Transfers of property by gift, whether "direct or indirect," are properly

subject to tax. *Jewett* v. *Commissioner*, 455 U.S. at 309 (citing 26 U.S.C. 2511(a)). The regulations that are specifically applicable to indirect transfers effected by a disclaimer have been in effect since 1958. See 455 U.S. at 312. It is the untimely disclaimer of the property interest in 1979—which occurred more than twenty years after adoption of the applicable regulation—that constituted the gift creating gift tax liability. As this Court stated in *Jewett* in rejecting a similar claim that a tax on disclaimers gives an improper "retroactive" effect to the gift tax (455 U.S. at 317 (footnote omitted)):[3]

> Petitioner also argues that it is unfair to apply the 1958 Regulation "retroactively" to an interest that had been created previously; petitioner asserts that, by the time the Regulation was adopted, it was already too late—according to the Commissioner's view—to disclaim the interest. The argument lacks merit. It is based on an assumption that petitioner had a "right" to renounce the interest without tax consequences that was "taken away" by the 1958 Regulation. Petitioner never had such a right. * * * The 1958 Regulation was adopted well in advance of the disclaimers in this case; we see no "retroactivity" problem.[4]

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[3] In the footnote omitted from this passage, the Court noted that the petitioner's argument in *Jewett* regarding his ability to make a timely disclaimer "[w]ould have more appeal had he attempted to renounce the interest immediately after the adoption of the 1958 Regulation, rather than some 14 years later." 455 U.S. at 317 n.20.

[4] Petitioner also contends (Pet. 12-13) that the omitted sentence from the textual quotation—which states that "petitioner does not argue that taxation of the disclaimers is inconsistent with the statutory provisions imposing a gift tax, which were enacted long before petitioner's interest in the trust was created"—demonstrates that disclaimed interests created prior to 1932 are not subject to gift tax. Since the interest at issue in *Jewett* was created in 1939, however, the sentence upon which peti-

3. In 1976, Congress enacted Section 2518 of the Internal Revenue Code, which altered the "reasonable time" requirement of the regulation. Under the new statute, a "qualified disclaimer" must be made within nine months after the later of the date on which the transfer creating the interest is made or the day on which the person making the disclaimer attains age 21. 26 U.S.C. 2518(b)(2). Section 2518 is not directly involved in this case since it applies only to disclaimers of interests that were created after December 31, 1976 (Treas. Reg. § 25.2518-1(a)) and petitioner's interest was created upon his birth in 1922.

The preexisting disclaimer regulation (Treas. Reg. § 25.2511-1(c)) was amended on August 7, 1986, however, to conform to the regulations promulgated under the new Section 2518 of the Code. See T.D. 8095, 1986-2 C.B. 160. Section 25.2511-1(c)(2) therefore now provides in pertinent part that:

> In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law.

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tioner relies was merely descriptive. The taxable event in the present case is the 1979 disclaimer, not the 1917 transfer in trust, and the Court's analysis in *Jewett* is directly applicable to this case.

In an attempt to bolster their contention that the gift tax applies only to disclaimers of interests that were created after the enactment of the gift tax in 1932, petitioner contends (Pet. 16-21) that the use of the word "taxable" in the phrase in the amended regulation referring to "taxable transfers creating an interest in the person disclaiming made before January 1, 1977" demonstrates that the gift tax applies only to disclaimed interests created after 1932. Petitioner claims that Lucius Ordway's original transfer, which created the interest that petitioner disclaimed in 1979, was not "taxable" because it was made in 1917, before the gift tax existed. Petitioner therefore concludes (Pet. 18) that his disclaimer falls outside the scope of the amended regulation.

As the court of appeals recognized (Pet. App. 9a), however, the term "taxable transfer" in the amended regulation merely refers to a transfer that is a completed gift for purposes of the gift tax, whether or not a gift tax was actually imposed. See Treas. Reg. § 25.2518-2(c)(3) ("With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift."). As petitioner appears to recognize (Pet. 18 n.19), annual gifts of up to $10,000 per donee (which are excluded from the gift tax under Section 2503(b) of the Code) nevertheless are treated as "taxable transfers" under the regulation. This interpretation by the Internal Revenue Service of its own regulation is entitled to considerable deference. See *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945).[5]

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[5] Contrary to petitioners' contentions (Pet. 19-21), there is nothing in the majority's opinion which "invites taxpayer abuse" or "destroys uniformity" in the disclaimer area. The potential abuses identified by petitioners are specifically addressed by the regulations. For example, with respect to potential abuse involving nongeneral powers of appointment, the regulation provides that "the holder of the power, per-

3. Petitioner acknowledges (Pet. 21) that he did not argue in the courts below that this Court's 1981 decision in *Jewett* should not be applied "retroactively" to tax the partial disclaimer in 1979. Petitioner nonetheless now claims (Pet. 21-26) that the court of appeals should have considered the argument *sua sponte* and should have resolved the question in his favor. Indeed, petitioner now suggests (Pet. 23 n. 22) that the case should be remanded for consideration of the retroactivity question, which petitioner failed to raise below.

The court of appeals can hardly be faulted for failing to consider an argument petitioner failed to raise. It is, for example, the settled practice of this Court as well to refrain from addressing issues not raised in the court of appeals. *EEOC* v. *FLRA*, 476 U.S. 19, 24 (1986) (per curiam). It is, in any event, not difficult to see why the issue was not presented below, for petitioner's retroactivity argument has no merit.

Petitioner became aware of his trust interest in 1941. Yet he waited 38 years, until 1979, to disclaim a portion of the interest. He contends (Pet. 23-26) that this delay was justified because of his reliance on *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), which held that the "reasonable time" for executing a tax-free disclaimer of a remainder interest did not commence to run until the disclaimed interest became vested and possessory upon the

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missible appointees, or takers in default of appointment must disclaim within a 9-month period after the original taxable transfer that created or authorized the creation of the power." Treas. Reg. § 25.2518-2(c)(3). Similarly, with respect to potential "multiple" disclaimers, the regulation provides that "[a] person who receives an interest in property as the result of a qualified disclaimer of the interest must disclaim the previously disclaimed interest no later than 9 months after the date of the taxable transfer creating the interest in the preceding disclaimant." *Ibid.*

death of the last surviving life tenant. Petitioner broadly claims (Pet. 26) that "[a]t no time prior to his disclaimer was [he] on notice that a failure to disclaim promptly might be at his own peril."

Petitioner's claim of reliance on *Keinath* is insubstantial. *Keinath* was not decided until 1973, fully 32 years after petitioner became aware of his trust interest. Moreover, in 1958, fully 15 years before *Keinath*, the Internal Revenue Service issued its regulation informing all taxpayers that indirect gifts effected by disclaimer were taxable, unless the disclaimers were made "within a reasonable time after knowledge of the existence of the transfer" (Treas. Reg. § 25.2511-1(c)(2)). In 1961, three years after the issuance of the regulation, the Tax Court in *Fuller* v. *Commissioner*, 37 T.C. 147 (1961), applied the regulation to a 1956 disclaimer of a trust interest created in 1931. The court noted in *Fuller* that a disclaimer executed 25 years after the creation of the interest "could not by any stretch of language be said to have been made within a 'reasonable time.'" *Id.* at 155. The next pertinent case was *Keinath* v. *Commissioner*, 58 T.C. 352 (1972), which the Tax Court decided in the Commissioner's favor. The Tax Court judge who decided *Keinath* relied heavily on *Fuller* as precedent. *Id.* at 358-359. It is, of course, true that the Tax Court's decision in *Keinath* was reversed by the Eighth Circuit the following year. In 1978, however, the Internal Revenue Service issued Technical Advice Memorandum 78-29-008 (Apr. 4, 1978), noting its disagreement with *Keinath*, and advising that it would not be followed in disposing of similar cases outside the Eighth Circuit. In that same year, the Tax Court decided *Jewett* in favor of the Commissioner. 70 T.C. 430 (1978). The Ninth Circuit (638 F.2d 93 (1980)) and this Court (455 U.S. 305 (1982)) subsequently affirmed that decision.

From this review, it is evident that petitioner could not have placed any reliance on the *Keinath* decision prior to

1973. But petitioner knew of his interest in the trust some 32 years before *Keinath* was decided. Moreover, prior to the *Keinath* decision, the applicable Treasury Regulation and the Tax Court's decision in *Fuller* placed petitioner on appropriate notice that a timely disclaimer for gift tax purposes had to be made within a reasonable time from knowledge of the creation of the interest. *Keinath* could thus have provided only limited assurance to petitioner between 1973 and 1978 (when the IRS issued its Technical Advice Memorandum) or 1981 (when this Court issued its ruling in *Jewett*). But, by 1973, petitioner had already possessed, for more than thirty years, the effective right to determine who would receive the benefits of his trust interest. This Court held in *Jewett* that the possession of such control over the disposition of property for a period of 24 years was sufficient to disqualify the disclaimer from the gift tax exception. See *Jewett* v. *Commissioner*, 455 U.S. at 319 (quoting *Jewett* v. *Commissioner*, 70 T.C. at 438 (footnote omitted)). The taxpayer in *Jewett* also sought to claim a right to rely upon *Keinath*, which was the only court of appeals decision on the issue prior to *Jewett*. See *Jewett* v. *Commissioner*, 638 F.2d at 95-96, and 455 U.S. at 323-324 (Blackmun, J., dissenting). Nevertheless, this Court determined that such reliance on *Keinath* was misplaced. 455 U.S. at 318 (the Commissioner's consistent interpretation "is entitled to respect").

The decision of the court of appeals in this case thus is merely a proper application of this Court's decision in *Jewett*. There is no conflict among the circuits or other reason to justify further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2501 (1970). IMPOSITION OF TAX.

(a) *Taxable Transfers.* –

(1) *General rule.* – For the first calendar quarter of calendar year 1971 and each calendar quarter thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar quarter by any individual resident or nonresident.

* * * * *

SEC. 2511. TRANSFERS IN GENERAL.

(a) *Scope.* Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

* * * * *

Treasury Regulations on Gift Tax (26 C.F.R.):

Section 25.2511-1 (1958) *Transfers in General*

* * * * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where law governing the administration of the decedent's estate gives a beneficiary, heir, or

next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution in interstate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property.

* * * * *

Section 25.2511-1(c) (1986) *Transfers in General*

* * * * *

(2) In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, where the law governing the administration of the decedent's estate gives a beneficiary, heir, or

next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20558